

IN THE COURT OF APPEALS 07/18/95
OF THE
STATE OF MISSISSIPPI
NO. 94-CC-00804 COA

LINDA D. SIMMONS APPELLANT

v.

MISSISSIPPI EMPLOYMENT SECURITY

COMMISSION and GULF STATES CANNERS APPELLEES

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND
MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B

TRIAL JUDGE: HON. JAMES E. GRAVES

COURT FROM WHICH APPEALED: HINDS COUNTY CIRCUIT COURT

ATTORNEY(S) FOR APPELLANT(S): PAUL E. ROGERS

ATTORNEY(S) FOR APPELLEE(S): PATRICK M. TATUM

NATURE OF THE CASE: STATE BOARDS AND AGENCIES

TRIAL COURT DISPOSITION: DENIED BENEFITS

BEFORE FRAISER, C.J., COLEMAN, PAYNE, and SOUTHWICK, JJ.

COLEMAN, J., FOR THE COURT:

This is an appeal from an order of the Circuit Court of the First Judicial District of Hinds County rendered on August 2, 1994 in which that court affirmed the Mississippi Employment Security Commission's denial of employment benefits to Linda D. Simmons. We affirm that order.

I. Facts and Administrative Procedure

Simmons had worked for Gulf States Cannery from April 4, 1986 until November 4, 1993, a period of seven and one-half years. After Gulf States terminated her employment on the latter date, she applied for unemployment benefits with the Mississippi Employment Security Commission. In the nonmonetary report of investigation made for the Commission, Mike Myrick, the Human Resources Manager for Gulf States Cannery, Inc., stated that Simmons had been tardy thirteen times from January, 1993 through November 4, 1993, her last working day. Myrick also stated that Simmons had been warned on March 24 and again on June 14, 1993, about Gulf States' policy which was intended to discourage employee tardiness and that she had been given her final warning on October 20, 1993, when she was told that were she tardy again, she would be discharged. In its warning to Simmons on March 24, her employer put Simmons on notice that from then on, in accordance with this policy, each tardy would be counted against her. When Simmons reported for work three minutes late on November 4, 1993 - her thirteenth tardy - she was fired.

In this same nonmonetary report of investigation, Simmons told the employment interviewer who prepared that report that "she was tardy for different reasons, either she would leave too late or get tied up in traffic." Simmons then said nothing about her granddaughter or her daughter having been ill or hospitalized. She acknowledged that she had been warned her employment would be terminated if she were again late for work pursuant to Gulf States' policy; but she told the employment interviewer that "[S]he was running one minute late on November 4. . . ." when she was fired.

On November 23, 1993, the Claims Adjuster denied Simmons' claim for unemployment benefits because he "determined you were discharged for misconduct connected with your work." Simmons filed her Notice of Appeal to Appeals Referee on November 30, 1993, pursuant to which an Appeals Referee conducted a hearing on Monday, December 13, 1993. At this hearing, the employer was represented by the same Mike Myrick, who testified that Gulf States' policy required that "[A]fter three tardies that's grounds for a warning. If you continue to have tardies we will subsequently give you an additional warning. And then if the tardies continue we will finally terminate your employment." Myrick also testified that all of Gulf States Cannery's employees were "made aware of this policy" by an employees' handbook, a copy of which had been delivered to Simmons. Myrick then testified that he had given Simmons a warning on May 19 after she had accumulated five tardies and that on October 20 she received her second warning about the consequences of her coming to work late. By October 20, she had been tardy for work twelve times. When the Appeals Referee asked Myrick whether he knew the reasons for Simmons' tardies, he replied that he did not know the reasons but that Gulf States did not differentiate between excused and unexcused tardies. He stated, "You're either on time or you're not on time."

At this hearing, Simmons testified that she was tardy on November 4 because she forgot her glasses when she left for work. She turned around and went back to get them, which resulted in her being three minutes late. When the Appeals Referee asked her for reasons for any of her first eleven tardies, she replied:

Well, my grandbaby got sick. And then I don't know if they gave me tardies on my daughter when I had to rush her to the hospital or not. Or either when I left work several times when she was in the hospital. I don't know. Is that considered tardies? . . . Mostly family problems."

On December 22, 1993, the Appeals Referee rendered her findings of fact, which were as follows:

Claimant was employed by Gulf States Cannery, Clinton, MS, for seven years as a shipping clerk until November 4, 1993. The employer has a policy that states employees who are excessively tardy will receive a written warning after three tardies, a second warning if the tardies continue, and a third tardy will result in termination. The claimant was warned in writing on May 19, 1993, and on October 20, 1993. At the time the claimant was warned on October 20, 1993, she was told that another tardy would result in her discharge. On November 4, 1993, the claimant was discharged because she was tardy for work on this day. The claimant was tardy because she returned home to get her glasses.

The Appeals Referee concluded from her findings of fact that "this does constitute misconduct in connection with the work as that term is used in the law." Thus, "the decision of the Claims Examiner is in order." Simmons then filed a Notice of Appeal to Board of Review which the Commission received on December 29, 1993, pursuant to which appeal the Board of Review adopted the findings of fact and opinion of the Referee and affirmed her decision. Simmons next appealed the Commission's denial of benefits to the Circuit Court of the First Judicial District of Hinds County, Mississippi, on the 28th day of February, 1994; and, as we previously noted, that court on August 2, 1994 entered its order in which it found that "the decision of the Board of Review of the Mississippi Employment Security Commission rendered and entered on the 8th day of February, 1994 is supported by substantial evidence and the applicable law." The Circuit Court accordingly affirmed the Board of Review's decision.

II. ISSUE

In her brief, Simmons poses this one issue for this court's resolution:

Whether the employer met its burden of proving by clear and convincing evidence that Appellant, Linda D. Simmons, exhibited misconduct connected with her work as defined by the Mississippi Supreme Court?

Section 71-5-31 of the Mississippi Code in pertinent part, provides the standard of review for this Court:

In any judicial proceedings under this section, the findings of the board of review as to the facts, if supported by evidence and in the absence of fraud, shall be conclusive, and the jurisdiction of said court shall be confined to questions of law.

Miss. Code Ann. § 71-5-31 (1972); *see also Mississippi Employment Sec. Comm'n v. Percy*, 641 So. 2d 1172, 1174 (Miss. 1994). We interpret this section to require that we affirm the Commission's Board of Review if its findings of fact are supported by substantial evidence and if we further determine that it had not misapplied the law to its findings of fact.

More recently, this state's Supreme Court decided an appeal from the Mississippi Employment Security Commission in which it applied the following standard of review:

This Court's standard of review of an administrative agency's findings and decisions is well established. An agency's conclusions must remain undisturbed unless the agency's order 1) is not supported by substantial evidence, 2) is arbitrary or capricious, 3) is beyond the scope or power granted to the agency, or 4) violates one's constitutional rights. A rebuttable presumption exists in favor of the administrative agency, and the challenging party has the burden of proving otherwise. Lastly, this Court must not reweigh the facts of the case or insert its judgment for that of the agency.

Allen v. Mississippi Employment Sec. Comm'n, 639 So. 2d 904, 906 (Miss. 1994) (citations omitted). A comparison of this latter standard of review, which appears to be the generic standard of review for the Mississippi Supreme Court's consideration of appeals from all of Mississippi's administrative agencies with the standard of review which the legislature specifically prescribed for appeals from the Mississippi Employment Security Commission in Section 71-5-31 of the Mississippi Code leads to the conclusion that while the "Section 71-5-31" standard of review for MESC appeals remains subordinate to the "generic" standard of review quoted in *Allen*, the "Section 71-5-31" standard of review is the appropriate initial standard of review for this court to employ when it engages in the resolution of issues which confront it in appeals from the MESC.

In the case *sub judice*, the facts were not disputed. We conclude that the hearing referee's findings of fact, which we previously quoted, were indeed supported by substantial evidence.

We next consider whether the Commission through its Board of Review correctly applied the law to the facts which they found and which we have previously recited in some detail. The legal issue in this case is whether Simmons' having been tardy for work thirteen times within a period of less than one year constituted "misconduct" within the meaning of Section 71-5-513(A)(1)(b) of the Mississippi Code of 1972. The Mississippi Supreme Court has defined misconduct as:

[C]onduct evincing such willful and wanton disregard of the employer's interest as is found in deliberate violations or disregard of standards of behavior which the employer has the right to expect from his employee. Also, carelessness and negligence of such degree, or recurrence thereof, as to manifest culpability, wrongful intent or evil design, and showing an intentional or substantial disregard of the employer's interest or of the employee's duties and obligations to his employer, came within the term. Mere inefficiency, unsatisfactory conduct, failure in good performance as the result of inability or incapacity, or inadvertences and ordinary negligence in isolated incidents, and good

faith errors in judgment or discretion were not considered 'misconduct' within the meaning of the Statute.

Shannon Eng'g & Constr. v. Mississippi Employment Sec. Comm'n, 549 So. 2d 446, 448-49 (Miss. 1989).

Appellate courts in other states have held that an employee's absenteeism can constitute misconduct sufficient to warrant denial of that employee's claim for unemployment benefits. *See, e. g., Morrison v. United States Pipe and Foundry Co.*, 598 So. 2d 946 (Ala. 1992) (Employee had been [1]warned numerous times about her tardiness, [2] suspended twice for her several tardies, and [3] at her last suspension was warned that her further tardiness would result in termination of her employment); *Cornell v. Review Bd. of the Indiana Employment Sec. Div.*, 383 N.E.2d 1102 (Ind. Ct. App. 1979) (employee, a public school teacher, was late on approximately 36 occasions); *Johnson v. Director of the Div. of Employment Sec.*, 385 N.E. 2d 975 (Mass. 1979) (where claimant, a former floor walker, after he had been warned that his employer would not tolerate tardiness, had been late to work on three occasions during his first two weeks of probationary employment, his behavior constituted deliberate misconduct which rendered him ineligible for benefits); *Stewart v. Employment Div.*, 561 P. 2d 648 (Or. Ct. App. 1977) (claimant who did not report for work until sometime between 10:00 a.m. and 11:00 a.m. after his shift had begun at 8:00 a.m. allegedly because he overslept and who had earlier received a written warning and three-day suspension for failure to appear for work was disqualified to receive unemployment compensation benefits).

The Mississippi Supreme Court has dealt with the issue of whether the claimant's absenteeism constituted such misconduct that an award of unemployment benefits was or was not proper. In *Mississippi Employment Security Commission v. Martin*, 568 So. 2d 725, 729 (Miss. 1990), the court held that absence from work because of treatment for alcoholism constituted "misconduct" so that the Mississippi Employment Security Commission correctly denied benefits to the claimant who had missed three straight days of work. Again in *Barnett v. Mississippi Employment Security Commission*, 583 So. 2d 193, 195 (Miss. 1994), our state's Supreme Court held that a claimant's failure to notify the employer of the reason for absences could constitute misconduct if there were a policy that required such notice. *Barnett*, 583 So. 2d at 196.

Mississippi Employment Security Commission v. Bell, 584 So. 2d 1270 (Miss. 1991) more nearly supports Simmons' contention in the case before us that her thirteen tardies did not constitute misconduct. In the *Bell* case, the claimant's work period was changed from third shift to first shift, the consequence of which was that she could no longer get her children after school.

She asked her supervisor to change her lunch break from 2:15 p.m. to 2:45 p.m. so that she could continue to get her children at school; but he refused her request. *Id.* at 1272. Bell's employer, Frito Lay, had an attendance policy, *Id.*, as did Gulf States Cannery, Simmons' employer; and like Simmons in the case *sub judice*, Bell received at least two warnings that she had violated her employer's attendance policy.

Nevertheless, the Mississippi Supreme Court held as follows:

Bell appears to be a victim of circumstances. She was a good employee for 13 years, and it was only after her work schedule changed that she began to have problems on the job. When she attempted to alleviate her problems, her supervisor thwarted her attempt by refusing to change her lunch schedule. In this instance, Bell's good faith effort negates any alleged wanton disregard of her employer's interest. We hold that Frito Lay failed to prove by substantial, clear and convincing evidence that Bell's actions constituted misconduct under Miss. Code Ann. § 71-5-513 A(1)(b) (Supp. 1988).

Bell, 584 So. 2d at 1274.

While we note the apparent similarity of facts between *Bell* and the case *sub judice*, *Bell* alone fails to persuade us that the Commission misapplied the law to its findings of fact when it denied Simmons' claim for unemployment benefits on the ground of misconduct. Simmons said nothing about her daughter's or her granddaughter's illness or hospitalization when she was interviewed by the claims examiner for the nonmonetary report of investigation. At this early stage of processing her claim for unemployment benefits, Simmons told the employment interviewer who prepared that report that "she was tardy for different reasons, either she would leave too late or get tied up in traffic." The appeals referee must have considered this inconsistency in her separate explanations of her tardiness to work; and we are no more persuaded by Simmons' testimony at the hearing that her tardy appearances for work were caused by her granddaughter's and daughter's illnesses and hospitalization (thus bringing her thirteen tardies within the ambiance of *Bell*) than was the hearings referee.

In harmony with the "Section 71-5-31" standard of review, the Mississippi Supreme Court wrote in the case of *Barnett v. Mississippi Employment Security Commission*, 583 So. 2d 193, 195 (Miss. 1994):

If substantial evidence supports the Board's fact finding and the relevant law was properly applied to the facts, the appellate court must affirm.

Our previous consideration of selected cases from other jurisdictions and those Mississippi Supreme Court decisions which deal with whether a claimant's absenteeism is misconduct compels us to conclude that where an employer has an established attendance policy which an employee persists in violating even after that employee has been warned and/or reprimanded at least two times or more for violating that attendance policy, the employee is indeed guilty of misconduct as it is defined by Section 71-5-513(A)(1)(b) of the Mississippi Code of 1972. Thus we conclude that the Commission correctly applied the law to the facts which it found in this case, which facts we have earlier found to have been supported by substantial evidence. In obedience to the "Section 71-5-31" standard of review we affirm the Hinds County Circuit Court, which affirmed the Commission's denial of unemployment benefits to Appellant.

III. Conclusion

We have earlier related the one issue which Simmons posed to this court as being dispositive of her appeal. Based on our foregoing discussion of (1) what we find to be the appropriate standard of review for appeals of unemployment compensation claims, (2) our analysis of the evidence which supported the findings of fact from which the hearings referee for the Commission concluded that Simmons had been guilty of misconduct, and (3) our consideration of whether the Commission acting through its hearings referee and Board of Review applied the correct law to those findings of facts, we now answer Appellant's question, "Whether the employer met its burden of proving by clear and convincing evidence that Appellant, Linda D. Simmons, exhibited misconduct connected with her work as defined by the Mississippi Supreme Court?" in the affirmative.

THE JUDGMENT OF THE HINDS COUNTY CIRCUIT COURT WHICH AFFIRMED THE MISSISSIPPI EMPLOYMENT SECURITY COMMISSION'S DENIAL OF BENEFITS IS AFFIRMED. COSTS ARE ASSESSED TO THE APPELLANT.

FRAISER, C.J., BRIDGES AND THOMAS, P.JJ., McMILLIN AND SOUTHWICK, JJ., CONCUR. PAYNE, J., DISSENTS WITH SEPARATE WRITTEN OPINION JOINED BY BARBER, DIAZ AND KING, JJ.

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PAYNE, J., DISSENTING:

Because I find that Simmons' activities which resulted in her termination from employment did not rise to the court's definition of misconduct, I respectfully dissent to the majority's opinion.

The facts are not in dispute. Both Simmons and her former employer, Gulf States Cannery (Cannery), agreed that Simmons worked for Cannery for seven years and that she had been tardy thirteen times in her last year, most of them after having been given warnings as provided by Cannery's employee handbook. The question on which Simmons appeals is whether or not such conduct constitutes "misconduct" that would disqualify her from receiving unemployment compensation benefits.

ARGUMENT AND DISCUSSION OF LAW

I agree that section 71-5-531 of the Mississippi Code sets forth that the scope of review is limited to questions of law.

I further agree that the definition of "misconduct" is:

[C]onduct evincing such willful and wanton disregard of the employer's interest as is found in deliberate violations or disregard of standards of behavior which the employer has the right to expect from his employee. Also, carelessness and negligence of such degree, or recurrence thereof, as to manifest culpability, wrongful intent or evil design, and showing an intentional or substantial disregard of the employer's interest or of the employee's duties and obligations to his employer, came within the term. Mere inefficiency, unsatisfactory conduct, failure in good performance as the result of inability or incapacity, or inadvertences and ordinary negligence in isolated incidents, and good faith errors in judgment or discretion were not considered 'misconduct' within the meaning of the [S]tatute.

Booth v. Employment Sec. Comm'n, 588 So. 2d 422, 425-26 (Miss. 1991). See *Mississippi Employment Sec. Comm'n v. Borden, Inc.*, 451 So. 2d 222, 225 (Miss. 1984); *Wheeler v. Arriola*, 408 So. 2d 1381, 1383 (Miss. 1982).

Allen v. Mississippi Employ. Sec. Comm'n, 639 So. 2d 904, 907 (Miss. 1994).

Unlike the majority, I do not agree that the lower court correctly applied the law to the facts. That court's definition of *misconduct* requires that the attitude be *willful* and *wanton* and the actions be *deliberate* violations or disregard for employer's standards.

The Court has said that acts of an employee which may warrant *termination* of employment do not necessarily rise to the level of *misconduct* so as to disqualify the employee from unemployment compensation. *Id.* at 907-08. In *Allen*, the employee cost the company over \$4,000 by grinding

undersized parts. *Id.* at 906. For that action, he received a written warning. *Id.* Later, he received a second written warning for failure to send parts to the proper station. *Id.* Even later, he was orally reprimanded for improper placement of parts on a rack and ultimately terminated for poor job performance. *Id.* The Commission held that "Allen's failure to perform work up to the standards required by his employee [sic] constituted misconduct." *Id.* The Court did not equate inept performance with misconduct, even when it cost the employer out-of-pocket dollars. *Id.* at 907-08.

In *Bell*, tardiness ripened into absenteeism and ultimately into termination. *Bell*, 584 So. 2d at 1272. The *Bell* Court affirmed the circuit court's ruling which read:

[T]here is no substantial evidence of misconduct rising to the level of the clear and convincing standard. This is not to say that continued absenteeism or tardiness cannot be grounds for misconduct under any circumstances. . . . Here, however, a long term employee experienced difficulty over a relatively short period because of *a domestic situation and other mishaps*. No *wilfulness* can be reasonably inferred.

Id. (emphasis added).

In the present case, most of Simmons' tardies were due to family illnesses. The last tardy of three minutes, when she went back home to get her glasses, cannot be said to constitute a disregard for her employer's interest. Simmons argued that being able to see to do her work was actually *in line* with her employer's interest. The *Bell* Court cited a Minnesota case where the employee's absences were caused by a child's illnesses:

In light of [employee's] good faith efforts, her inability to find care for her child is not 'misconduct'. . . . [Employee's] actions were motivated by a willful regard for her child's interests and not a wanton disregard of her employer's interest or lack of concern for her job. Where the circumstances do not overwhelmingly demonstrate that an employee's absences are *deliberate, willful, or equally culpable*, we may also examine the employee's *history, conduct, and underlying attitude*.

Id. at 1274 (citation omitted). Similar language applies in this case. *Bell* was found by the Court to be a victim of circumstances, as well as a good, long-time employee. The Court found that:

In this instance, *Bell's* good faith effort negates any alleged wanton disregard of her employer's interest. We hold that Frito Lay failed to prove by substantial, clear and convincing evidence that *Bell's* actions constituted misconduct under Miss. Code Ann. § 71-5-513 A(1)(b) (Supp. 1988).

Id.

The burden of proof is a critical factor to be considered at this point. The Mississippi Supreme Court has reversed a ruling of a lower court on the basis that the appeals referee misallocated the burden of proof by requiring a claimant to prove that he left his job for good cause. *Ferrill v. Mississippi Employ. Sec. Comm'n*, 642 So. 2d 933, 934 (Miss. 1994). Thus, the Court has held that the burden of proof in unemployment compensation cases is properly on the employer. In the present case, not only did Cannors fail to refute Simmons' testimony of family reasons for her tardies (grandchild's illness, rushing daughter to the hospital, being in hospital with daughter who was a patient), but it indicated that good faith was irrelevant since it had a policy of "no excused tardies." If good faith negates wanton disregard of an employer's interest, Cannors has failed to prove misconduct which would require a denial of unemployment benefits. Finally, Cannors has not met its burden of proving misconduct consistent with the definition of misconduct in *Allen* and its predecessor line of cases. *Allen*, 639 So. 2d at 907.

A review of MESC cases in the last few years shows that *misconduct is not*: driving a forklift over a co-worker's foot after having been warned as a result of doing it once before, (holding that the actions were not willful and wanton or culpably negligent), *Sprouse v. Mississippi Employ. Sec. Comm'n*, 639 So. 2d 901, 902-03 (Miss. 1994); under grinding parts, sending parts to the wrong work station, and improperly placing parts on the racks, *Allen v. Mississippi Employ. Sec. Comm'n*, 639 So. 2d 904, 905-06 (Miss. 1994); backing delivery trucks into stationary objects five times in six months, *Foster v. Mississippi Employ. Sec. Comm'n*, 632 So. 2d 926, 927 (Miss. 1994); discussing a raise after having been expressly told not to talk to anyone about it, *Gore v. Mississippi Employ. Sec. Comm'n*, 592 So. 2d 1008, 1009-10 (Miss. 1992); excessive absenteeism caused by family care difficulties, *Mississippi Employ. Sec. Comm'n v. Bell*, 584 So. 2d 1270, 1271-73 (Miss. 1991); being involved in a fight on the employer's premises, *Mississippi Employ. Sec. Comm'n v. McLane-Southern, Inc.*, 583 So. 2d 626, 627 (Miss. 1991); refusing to do hazardous and dangerous work, *Mississippi Employ. Sec. Comm'n v. Phillips*, 562 So. 2d 115, 116-17 (Miss. 1990); wearing a religious head wrap in violation to a local dress code, *Mississippi Employ. Sec. Comm'n v. McGlothlin*, 556 So. 2d 324, 325-27 (Miss. 1990); refusing to sign a paper without reading it, *Shannon Eng'g and Constr., Inc. v. Mississippi Employ. Sec. Comm'n*, 549 So. 2d 446, 447-48 (Miss. 1989); and consumption of small quantities of food without payment, *Piggly Wiggly of Bay Springs v. Mississippi Employ. Sec. Comm'n*, 465 So. 2d 1062, 1063 (Miss. 1985). None of these acts were found to constitute a willful and wanton disregard of the employer's interest, as would be found in deliberate violations of or a wanton disregard for standards of behavior. Likewise, I would hold that Simmons' tardies did not constitute such a willful and wanton disregard of Cannors' interest as well.

The majority's consideration of cases from other jurisdictions is not persuasive in that Simmons' conduct does not rise to the level of the conduct cited. Simmons had never been suspended for being tardy; Simmons was not on probationary employment; nor was Simmons two to three hours late on the date of her last tardy. To the contrary, Simmons' final tardy, resulting in her termination, occurred when she was merely three minutes late after having returned home to retrieve her forgotten glasses. Particularly troubling is the majority's reliance upon Simmons' response to the claims examiner in that she failed to mention specific reasons for her tardiness beyond "different reasons, either she would leave too late or get tied up in traffic." At the hearing, Simmons further explained her tardies by giving family reasons (grandchild's illness, rushing daughter to the hospital, being in

hospital with daughter who was a patient). The hearing served its purpose--to elicit testimony and gather evidence regarding Simmons' termination. The fact that she utilized the hearing as it was intended should not work to her detriment. Rather, Simmons' testimony at the hearing, which is consistent with her prior statement and merely an elaboration of her previous answer, should be considered as a whole.

It might be well to remind ourselves of the legislative intent expressed in Mississippi statutory law and quoted in *Shannon Eng'g and Constr., Inc.*:

As a guide to the interpretation and application of this chapter, the public policy of this state is declared to be as follows: Economic insecurity due to unemployment is a serious menace to the health, morals, and welfare of the people of this state. Involuntary unemployment is therefore a subject of general interest and concern which *requires appropriate action by the legislature to prevent its spread and to lighten its burden, which now so often falls with crushing force upon the unemployed worker and his family.* The achievement of social security requires protection against this greatest hazard of our economic life. This can be provided by encouraging employers to provide more stable employment and by the systematic accumulation of funds during periods of employment to *provide benefits for periods of unemployment, thus maintaining purchasing power and limiting the serious social consequences of poor relief assistance.* The legislature, therefore, declares that in its considered judgment the public good and the general welfare of the citizens of this state require the enactment of this measure, under the police powers of the state, for the compulsory setting aside of *unemployment reserves to be used for the benefit of persons unemployed through no fault of their own.*

Shannon Eng'g and Constr., Inc., 549 So. 2d at 450 (emphasis added) (citing Miss. Code Ann. § 71-5-3 (1972)).

Despite Simmons' loss of employment *by her own actions*, her conduct does not rise to the level of *misconduct* as defined in *Allen and Bell*. No evidence exists that Simmons acted in wanton disregard of Cannons interest or from a lack of concern for her job. This Court agrees that the Board's findings of fact are conclusive. However, I find that the facts as applied to the law indicate Simmons' actions did not constitute misconduct. I would find that Simmons is eligible to receive unemployment compensation benefits. Therefore, I would reverse the lower court's judgment, and render judgment in Simmons' favor.

BARBER, DIAZ AND KING, JJ., CONCUR WITH THIS OPINION.